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No. 08-681

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.
MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief.

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OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit, denying Petitioner's motion to stay the Board of Immigration Appeals' ("BIA") order of removal pending consideration of his petition for review, is unreported. JA 74. The summary order of the BIA denying Petitioner's Motion to Reopen is unpublished. JA 70-73.

JURISDICTION

The order of the Court of Appeals denying Petitioner's motion to stay the BIA's removal order was entered on November 5, 2008. On November 7, 2008, Petitioner filed an emergency motion in this Court for a stay of removal pending adjudication of the petition for review in the Court of Appeals or, in the alternative, for this Court to treat the motion as a petition for a writ of certiorari and grant Petitioner a stay pending resolution of the petition. On November 25, 2008, this Court granted the application for a stay, ordered the application to be treated as a petition for a writ of certiorari, and granted the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act section 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B), provides:

(B) Stay of order

> Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

Immigration and Nationality Act section 242(f), 8 U.S.C. § 1252(f), provides:

(f) Limit on injunctive relief

(1) In general

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

The complete 8 U.S.C. § 1252 is reprinted in the Appendix that follows this brief.

STATEMENT OF THE CASE

Federal courts have historically applied the traditional test for stays to discretionary motions to stay an alien's removal pending appeal. Under that test, four factors are considered: the likelihood of success on the merits, the possibility of irreparable harm, the harm to other parties, and the public interest. A divided Fourth Circuit, in conflict with eight other Courts of Appeals and in concert with only the Eleventh Circuit, recently declared that this traditional rule was overridden by a provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, that is titled "Limits on Injunctive Relief" and does not even mention stays.

The decision of the Fourth Circuit cannot be squared with IIRIRA's language, structure, or purpose, all of which support the conclusion that Congress did not intend § 1252(f)(2) to modify the traditional standard for discretionary stays of removal pending appeal. That conclusion is also supported by longstanding precedent of this Court distinguishing between stays and injunctions, and by Congress's own words elsewhere in the U.S. Code – words that demonstrate that when Congress intends to legislate concerning stays, it says so. In § 1252(f)(2), it did not.

Applying § 1252(f)(2) to motions for stays of removal would have grave consequences. Aliens with meritorious claims would be removed to countries where they may face persecution, torture, or death. Both this Court and the Courts of Appeals would lack the discretion to prevent irreparable harm even in the face of irrefutable evidence that such harm will result and even where doing so is undoubtedly in the public interest. This was not Congress's intent, and the Fourth Circuit erred in so holding.

A. Legal Background

Persons who are ordered removed from the United States pursuant to a final order of removal from an Immigration Judge or the Bureau of Immigration Appeals may petition for review of their removal order in the federal Courts of Appeals. *See* 8 U.S.C. § 1252(a); *see also* 8 C.F.R. § 1241.1 (defining a final order of removal).

Prior to 1996, the Immigration & Nationality Act ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1101 *et seq.*), provided in most cases for a mandatory stay of removal (then called "deportation")[1] upon the filing of a petition for review. *See* 8 U.S.C. § 1105a(a)(3) (1994) (repealed). In the small class of cases where stays of deportation were discretionary, courts applied the traditional

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[1] "Removal" is the term used by Congress in IIRIRA and thereafter to reference what was formerly known as "deportation." *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34 n.1 (2006).

standard for a stay. *See, e.g.*, *Michael v. INS*, 48 F.3d 657, 664-65 (2d Cir. 1995); *Ignacio v. INS*, 955 F.2d 295, 299 (5th Cir. 1992). Applying that test, courts generally consider four factors in determining whether to grant a stay: likelihood of success on the merits, possibility of irreparable harm, harm to other parties, and the public interest. *See, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Mohammed v. Reno*, 309 F.3d 95, 100-01 (2d Cir. 2002); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001); *Michael*, 48 F.3d at 664; *Ignacio*, 955 F.2d at 299.

In 1996, Congress revised the INA when it enacted IIRIRA. As relevant to this case, Congress made three changes to the statutory framework:

First, Congress eliminated automatic stays of removal pending review, providing instead that "[s]ervice of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." IIRIRA § 306(a), 110 Stat. 3009-608 (codified at 8 U.S.C. § 1252(b)(3)(B)). Thus IIRIRA rendered all stays of removal discretionary. Congress refrained in § 1252(b)(3)(B) from specifying any change to the relevant legal standard.

Second, Congress repealed the jurisdictional bars to pursuing a petition for review of an order of removal from outside the United States following a petitioner's departure or removal from the country. *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a(c) (1994)).

Third, in a separate subsection, Congress added a provision titled "Limits on Injunctive Relief." *See* IIRIRA § 306(a), 110 Stat. 3009-611 (codified at 8 U.S.C. § 1252(f)). By its terms, this provision addresses injunctions, not stays. Section 1252(f)(1) imposes limits on class-wide injunctive relief in cases challenging the new immigration procedures established in IIRIRA. Section 1252(f)(2) imposes limits on injunctive relief in "[p]articular cases." Specifically, § 1252(f)(2) provides:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

Since IIRIRA's enactment, eight circuits have held that the traditional stay standard continues to govern stay of removal orders, notwithstanding § 1252(f)(2). *See Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Mohammed*, 309 F.3d at 98-100; *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004) (applying the traditional standard without discussion).

Only the Fourth Circuit and Eleventh Circuit disagree, and those Circuits are sharply divided. *See*

Teshome-Gebreegziabher v. Mukasey, 528 F.3d 330 (4th Cir.), *reh'g en banc denied*, 545 F.3d 285 (4th Cir. 2008); *Weng v. U.S. Att'y Gen.*, 287 F.3d 1335 (11th Cir. 2002). *But see Teshome-Gebreegziabher v. Mukasey*, 545 F.3d 285, 289-90 (4th Cir. 2008) (Michael, J., dissenting from the denial of rehearing en banc, joined by Motz, King, & Gregory, JJ.); *Bonhomme-Ardouin v. U.S. Att'y Gen.*, 291 F.3d 1289, 1290 (11th Cir. 2002) (Barkett, J., concurring, joined by Wilson, J.).

The choice of the proper standard is critical to a petitioner's ability to obtain a stay of his final order of removal: "If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits." *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers). While stays are certainly not automatic under the traditional standard, *see, e.g.*, *Mohammed*, 309 F.3d at 102-03; *Hor*, 400 F.3d at 485-86; *Andreiu*, 253 F.3d at 484 (denying motions for stays under the traditional standard), those petitioners with a sufficient likelihood of success who can make a showing of irreparable harm may remain in the country until appellate review is complete.

B. Factual Background

1. Petitioner's Initial Asylum Application

Petitioner Jean Marc Nken, a native and citizen of Cameroon, lawfully entered the United States on

April 1, 2001, in transit with authorization to remain for a temporary period. JA 9. He remained thereafter.

In December, 2001, Nken applied for asylum, withholding of removal and protection against removal under the Convention Against Torture. JA 10.

Nken's application set forth the following facts: Nken was arrested twice in Cameroon because of his participation in anti-government protest activities as an influential member of a student organization at the University of Yaoundé. CA App. 214-219.[2] The main subject of these demonstrations was the government's refusal to permit a multi-party, democratic political system in Cameroon.

When he was arrested the first time, he had been participating in a pro-democracy march. CA App. 214. The government detained him for approximately one month in prison, where he was frequently beaten and interrogated about the group sponsoring the march. CA App. 214. After he was released, Nken fled to the Ivory Coast where he continued to participate in activities protesting the treatment of Cameroonians and the absence of fair elections. CA App. 214-216.

Due to violence and political unrest in the Ivory Coast, he left the country in December 2000 to return to Cameroon, where he was arrested immediately upon his arrival at the airport. He was

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[2] "CA App." refers to the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit.

detained again for approximately 30 days, and was again beaten while in custody, interrogated about his political activities opposing the Cameroonian government, and accused of plotting to overthrow the current regime. Upon his release, he departed Cameroon. CA App. 216.

After applying for asylum in the United States, Nken received a removal hearing before the Immigration Judge ("IJ"). During the hearing, the IJ several times had to direct Nken's counsel to lead him through his testimony and admonished him to "move on." CA App. 147-149, 167. When Nken's counsel requested permission to approach Nken in order to authenticate letters from his brother and father, the IJ declined, stating, "It's fine, Mr. Washington. It's been marked into evidence." CA App. 174.

At the close of the hearing, the IJ denied Nken's application. JA 24-26. The IJ found that because the documents submitted in support of the petition were not authenticated, they were subject to "de minimis weight." JA 20. The IJ also stated that the letters from his brother and father were not notarized and faulted Nken for not presenting "proof as to the relationship to his alleged father and brother who wrote letters on his behalf." JA 22.

Nken appealed to the BIA, which, on August 12, 2004, remanded to the IJ to make a specific adverse credibility finding, JA 30-31. On March 4, 2005, the IJ did so based on "improbabilities" and "difficulties with the [Nken's] documents." JA 35. The IJ thus found that Nken failed to carry his burden of proof to

establish eligibility for relief and ordered him removed to Cameroon. JA 34-36.

Nken appealed the IJ's remand decision to the BIA on March 31, 2005. His counsel, who longer represents Nken, failed to file his brief in a timely manner and his motion for the BIA to accept it out of time was denied. JA 45 n.1. On June 16, 2006, the BIA affirmed the IJ's decision and issued a final order of removal. JA 44-49.

2. Petitioner's Motion to Reopen Based on His Bona Fide Marriage to a U.S. Citizen and His Approved I-130 Application

During the course of these asylum proceedings, Nken met Brigitte Beloeck, who was then a permanent resident of the United States and is now a U.S. citizen. Nken and Beloeck married on November 4, 2004. They remain married today, and have a child together who is a U.S. citizen. CA App. 619-620.

On November 17, 2004, Beloeck filed an I-130 Petition for Alien Relative on Nken's behalf. CA App. 539-549. She made the application to demonstrate the bona fide nature of Nken's marriage to a U.S. citizen and to seek lawful status for him on that basis. This I-130 petition was still pending at the time the IJ denied Nken's asylum petition on March 4, 2005.

When Nken appealed the IJ's decision to the BIA in March 31, 2005, he also submitted a motion to remand the case to the IJ in order to apply for

adjustment of status based on his bona fide marriage to a U.S. citizen. CA App. 504-511. On June 16, 2006, the BIA denied the motion to remand because the Department of Homeland Security ("DHS") had still not yet approved the I-130 petition. JA 44-49.

Nken filed a timely Petition for Review in the United States Court of Appeals for the Fourth Circuit and a motion to reconsider with the BIA. CA App. 587-598. The BIA denied Nken's motion to reconsider on September 27, 2006. JA 50. On April 3, 2007, the Fourth Circuit denied his Petition for Review. JA 51-54.

As these proceedings were ongoing, on August 22, 2006 – nearly two years after it was filed – Nken's I-130 was approved by DHS, affirming that Nken's marriage was bona fide. CA App. 742.

On December 19, 2006, Nken filed a motion with the BIA to reopen proceedings based upon the approved I-130. CA App. 607-730. This motion was denied by the BIA as numerically barred on June 7, 2007. JA 55. On July 5, 2007, Nken filed a Petition for Review in the Fourth Circuit challenging the denial of his motion to reopen, which was denied on April 9, 2008. JA 56-57.

3. Petitioner's Motion to Reopen Based on Changed Country Conditions

In February 2008, Paul Biya, the President of Cameroon, announced that he planned to amend the Cameroonian Constitution to allow him to become a dictator for life. CA App. 756-771. Riots and turmoil

ensued in Cameroon in the months that followed. CA App. 756-771.

On May 7, 2008, Nken filed the motion with the BIA that ultimately gave rise to this case. His motion sought to reopen his asylum proceedings based on changed country conditions in Cameroon. He also sought to stay the BIA's final order of removal pending review of his motion to reopen. JA 58-68. In support of his motion to reopen, Nken presented newspaper articles reporting a sharp increase in political unrest in Cameroon and described an emerging pattern of retaliation by the regime against protestors and critics. CA App. 756-771. Nken also submitted photographs of himself at a recent demonstration against the Biya regime at the Cameroonian Embassy. CA App. 751-754. And Nken submitted a detailed letter from his brother in Cameroon which described how Biya was arresting political opponents and stated that Nken's brother had himself been arrested. JA 65-68. According to Nken's brother, Biya's government was inspecting lists of students who had demonstrated against the government in the 1990s, and Nken's name was on those lists. JA 66. The letter warned Nken that "it is really dangerous for you being one of those with problems from the past" and that Nken's "life will be in a real danger" if he returned to Cameroon. JA 66-67.

On June 23, 2008, the BIA denied Nken's motion to reopen on the ground that Nken had failed to present sufficient evidence to establish the existence of changed country conditions. JA 70-73. The BIA

did not find the evidence presented by Nken to be lacking credibility or authenticity. Rather, the BIA dismissed the letter by mischaracterizing it as simply "describing the civil unrest that 'started with the taxi-cab drivers' strike because of the high price of gas and which transformed this strike into a social movement.'" JA 71. The BIA concluded that Nken "has failed to show how these events alter his persecution claim." JA 72. The BIA failed to mention or address the parts of the letter warning Nken that the Biya regime was arresting members of its political opposition and that Nken would be in danger if he returned to Cameroon.

In addition, the BIA faulted Nken for not submitting his own statement or asylum application describing why changed conditions in Cameroon entitled him to asylum. According to the BIA, Nken's silence was "[n]otabl[e]" and "significant in this case where the Immigration Judge's adverse credibility determination remains undisturbed." JA 71. Nevertheless, the BIA did not itself make any adverse credibility finding, nor tie the original IJ's credibility finding to the evidence presented in support of the motion to reopen, nor otherwise question the credibility – as opposed to the sufficiency – of the evidence presented by Nken in support of his motion to reopen. Nor did the BIA cite any statute or regulation in support of its apparent requirement that a petitioner submit a personal statement in support of a motion to reopen.

While the above proceedings were ongoing, Nken was arrested outside of his and his family's home for

violating the Intensive Supervision and Appearance Program ("ISAP"), which had required Nken to report on a daily basis to the ISAP Office in Baltimore, a drive of several hours to and from his home. First Amended Petition for a Writ of Habeas Corpus at 4-6, *Nken v. Chertoff*, No. 08-cv-1010 (CKK) (D.D.C. filed June 30, 2008). He was placed in detention at the Howard County Detention Center in Jessup, Maryland, where he is currently being held. *Id.* at 4. On June 11, 2008, he was informed by Immigration and Customs Enforcement officials that he would be deported that month. *Id.* at 5. Nken obtained new counsel and filed a Petition for Habeas Corpus, which is pending in the District Court for the District of Columbia, No. 08-cv-1010 (CKK).

On July 23, 2008, Nken filed a Petition for Review in the Fourth Circuit arguing that the BIA abused its discretion by, among other things, failing to evaluate the evidence presented in support of Nken's motion to reopen. CA App. 881-884.

4. Petitioner's Motion to Stay in the Fourth Circuit

On August 6, 2008, Nken filed a motion to stay the BIA's order of removal pending resolution of his petition for review of the BIA's denial of his motion to reopen based on changed country conditions. Nken contended that he was entitled to have his removal order stayed pending appeal under the standard announced by the Fourth Circuit in *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir.), *reh'g en banc denied*, 545 F.3d 285 (4th Cir. 2008). Nken also argued that the Fourth Circuit

was wrong to apply § 1252(f)(2) to requests for a stay and that he was entitled to a stay of his final order of removal under the traditional stay standard.

On November 5, 2008, the Fourth Circuit denied Nken's stay motion in a one-sentence order. JA 74.

5. Petitioner's Motion to Stay in this Court

On November 7, 2008, Nken filed an emergency motion in this Court to stay the BIA's removal order pending consideration of his petition for review in the Court of Appeals or, in the alternative, for this Court to treat his motion as a petition for a writ of certiorari, grant the petition, and grant Nken a stay of removal pending resolution of the petition. On November 25, 2008, this Court granted the application for a stay, ordered the application to be treated as a petition for a writ of certiorari, and granted the petition.

SUMMARY OF ARGUMENT

Courts have historically applied the traditional stay standard to discretionary motions to stay a petitioner's final order of removal pending judicial review. This case arises because the Fourth Circuit has interpreted a provision of IIRIRA that does not even use the word "stay" as modifying that traditional standard. The Act's plain text, structure, and legislative history demonstrate that Congress intended no such thing.

By its plain terms, 8 U.S.C. § 1252(f)(2) governs only the standard courts apply when deciding whether to grant an injunction against removal of an alien. But a stay is not an injunction. A stay is directed at a judicial or administrative order, whereas an injunction is directed at a party to litigation. A stay temporarily deprives an order of the force of law pending further proceedings, whereas an injunction requires a person or entity to act or abstain from acting. A court issuing an injunction must specify the precise parties affected and the exact actions prohibited or ordered; no such statement is required in a stay because a stay is not directed at the actions of parties. These distinctions have been recognized repeatedly by courts, including this Court, and by Congress. Applying § 1252(f)(2) to stays would therefore stretch the language of the statute beyond the limits contemplated by Congress.

The structure of IIRIRA confirms that when Congress used the word "enjoin" in § 1252(f)(2), it did not mean "stay." In a separate subsection of IIRIRA, Congress provided that a petition for judicial review of an order of removal does not operate as a "stay" of removal "unless the court orders otherwise." § 1252(b)(3)(B). Thus when Congress wanted to enact legislation governing stays in IIRIRA, it used the word "stay." And when it did so, Congress did not cross-reference the standard for injunctive relief or provide any indication that subsections (b)(3)(B) and (f)(2) ought to be read together. Indeed, IIRIRA applied only one of the two subsections to transitional cases pending at the time of its enactment, implying that they ought not be read in

tandem. Moreover, interpreting § 1252(f)(2) to apply to stays would create surplusage in other parts of the statute, including in subsection (f)(1). Section 1252(f)(1) uses the language "enjoin or restrain," whereas subsection (f)(2) uses only "enjoin." "Enjoin" is the term Congress uses to denote permanent relief; "restrain" is the term employed to denote temporary relief. To interpret § 1252(f)(2) to apply to temporary equitable remedies, including stays, would render § 1252(f)(1)'s use of "restrain" superfluous.

The Fourth Circuit's interpretation would also produce results that Congress could not have intended. From a practical standpoint, it would mean that Congress intended to make it more difficult for a court to grant a temporary stay than ultimately to grant the petition and vacate the underlying removal order. The standard in § 1252(f)(2) would limit a petitioner's ability to obtain a stay pending review even where the petitioner is likely to succeed on the merits and may be exposed to dangerous, potentially deadly, conditions if he is removed. Although a stay is hardly automatic under the traditional standard, courts applying the traditional stay standard would not be forced to imperil the lives of petitioners with strong cases and a high risk of irreparable harm because they could consider the equities before sending petitioners in harm's way.

Applying the § 1252(f)(2) standard to stays would also have serious consequences for U.S. citizens who may face removal because of a dispute about their

citizenship. If applied to limit the ability of such citizens to obtain a stay, § 1252(f)(2) would render unworkable or inexplicable the procedures set forth in IIRIRA calling for a hearing to adjudicate material disputes of fact about a petitioner's citizenship – a hearing at which the petitioner's presence is necessary.

In the absence of a clear command from Congress, courts should continue to apply the traditional stay standard to determine when to stay a petitioner's order of removal pending judicial review. IIRIRA contains no such clear command, and § 1252(f)(2) may not be read to alter courts' traditional power to stay an order pending appeal.

ARGUMENT

I. THE TEXT OF § 1252(f) DEMONSTRATES THAT CONGRESS DID NOT INTEND IT TO APPLY TO STAYS OF REMOVAL ORDERS PENDING APPEAL.

The power to grant a stay is one of the federal courts' traditional equitable powers. Indeed, it is "a power as old as the judicial system of the nation." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 17 (1942); *see also In re McKenzie*, 180 U.S. 536, 551 (1901). Because "[t]he circumstances surrounding a controversy may change irrevocably during the pendency of an appeal . . . . it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which

may later be found to have been wrong." *Scripps-Howard Radio*, 316 U.S. at 9 (footnote omitted). "It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.* at 9-10 (footnote omitted).

The question presented here is whether Congress intended in IIRIRA to displace the federal courts' traditional stay authority in immigration cases. As always, the starting point for statutory interpretation is the statute's plain language. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). And here, that review of the plain language takes place against two settled canons of construction.

First, because of the importance of the courts' traditional stay power, this Court has stated that "Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Scripps-Howard Radio*, 316 U.S. at 11; *see also Miller v. French*, 530 U.S. 327, 340 (2000) (courts "should not construe a statute to displace [their] traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary." (citations omitted)).

Second, the burden the government bears in demonstrating a clear statement in the statute is heightened by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 128

S. Ct. 2307, 2318 (2008) (citations and quotation marks omitted); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (citation and internal quotation marks omitted)); *Costello v. INS*, 376 U.S. 120, 128 (1964).

Against that backdrop, a straightforward textual analysis demonstrates the error of the Fourth Circuit's approach. The word "stay" does not appear anywhere in the text of 8 U.S.C. § 1252(f)(2). It is undisputed that this provision restricts a court's ability to permanently enjoin the removal of an alien. What is disputed is the Fourth Circuit's conclusion that the use of the term "enjoin" in § 1252(f)(2) encompasses *both* a court's ability to permanently enjoin a petitioner's removal *and* its ability to stay the removal order issued by the BIA or IJ temporarily while appellate review takes place. This reading is contrary to the historical distinction between stays and injunctive relief – a distinction that is reflected in common usage, this Court's jurisprudence, and the statutory text. The text of § 1252(f)(2) thus cannot bear the weight ascribed to it by the Fourth Circuit and Respondent.

A. Section 1252(f)(2), by Its Plain Language, Concerns Only Injunctions, Not Stays.

Section 1252(f)(2) is addressed to injunctions, not stays. The provision uses the word "enjoin," which is simply the verb form of the noun "injunction." *See Black's Law Dictionary* 570 (8th ed. 2004) (defining "enjoin" as "[t]o legally prohibit or restrain by injunction"); *cf. Reno v. Am.-Arab Anti-Discrimination Comm. ("AAADC")*, 525 U.S. 471, 481 (1999) ("By its plain terms, and even by its title, [§ 1252(f)] is nothing more or less than a limit on injunctive relief."). Since a stay is not an injunction, Congress did not intend to modify the standard for stays of removal by use of the term "enjoin" in § 1252(f)(2).

History and common usage establish a formal distinction between stays and injunctions. As Judge Easterbrook explained in a decision rejecting the construction of § 1252(f)(2) advanced by the Fourth Circuit:

> An "injunction" is an order issued as the relief in independent litigation, while a "stay" is an order integral to a system of judicial review: an appellate court may stay a district judge's order, or its own mandate, or an agency's decision when the agency plays the role of the district court and the initial judicial tribunal is a court of appeals.

Hor, 400 F.3d at 484; *see also Tesfamichael*, 411 F.3d at 173-74 ("Though an injunction is relief obtained through independent litigation and directed at a

particular party, not a tribunal, a stay is a mechanism intrinsic to judicial review."); *accord Andreiu*, 253 F.3d at 482-83; *cf. Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 381 n.5 (2008) ("A stay is a useful tool for managing the impact of injunctive relief pending further appeal, but once the Court resolves the merits of the appeal, the stay ceases to be relevant."); *Cavel Int'l Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (Posner, J.) (noting the "difference between asking a district court for a preliminary injunction and asking a court of appeals for a stay of, or other relief from, the district court's ruling.").

An "injunction" is thus a legal remedy that governs the conduct of a party to a legal proceeding, while a stay is a temporary suspension of a judicial or administrative order independent of the ultimate remedy sought. *Compare Black's Law Dictionary* 800 (8th ed. 2004) (defining "injunction" as "[a] court order commanding or preventing an action."), *and id.* (observing that "[i]n a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam*." (internal quotation marks omitted)), *with id.* at 1453 (defining "stay" as the "postponement or halting of a proceeding, judgment, or the like" and "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding"). Because a stay temporarily stops the legal effect of an order, whereas an injunction controls the conduct of a party, a court may stay an injunction, *see, e.g.*, *Lewis*

v. Casey, 511 U.S. 1066 (1994), but a court does not "enjoin" a stay.

This distinction between a stay and an injunction is a matter of substance, not merely semantics. Different legal rules often apply depending upon whether a judge imposes an injunction or issues a stay. For example, Federal Rule of Civil Procedure 65 provides that "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail . . . *the act or acts restrained or required*." Fed. R. Civ. P. 65(d)(1) (emphasis added) (derived from the Clayton Act, 38 Stat. 738, 28 U.S.C. § 383 (1940) (repealed)). There is no such requirement when a court grants a stay. That makes sense because there is no "act or acts restrained or required" by a stay. As Circuit Justice Rehnquist explained:

> The [Government] contends that since the action of the Court of Appeals [in granting a stay] is equivalent to a preliminary injunction issued by a district court, the Court of Appeals should be required to make the same sort of findings before granting such a stay as are required of a district court by Fed. Rule Civ. Proc. 65. . . . A court in staying the action of a lower court, or of an administrative agency, must take into account factors such as irreparable harm and probability of success on the merits. But in the absence of a statute, rule, or controlling precedent there is no fixed requirement that a court recite the fact that it

> has taken these into consideration, or explain its reason for taking the action which it did.

Coleman v. PACCAR, Inc., 424 U.S. 1301, 1304-05 (1976) (Rehnquist, J., in chambers) (citations omitted).

Stays pending review are governed by Federal Rules of Appellate Procedure 8 and 18, not Rule 65(d) of the Federal Rules of Civil Procedure. Rules 8 and 18 require no description of the "act or acts" stayed. Instead, a party seeking a stay must submit the order being stayed to the reviewing court because the order itself is the subject of the stay. Fed. R. App. P. 8(a)(2)(B)(iii), 18(a)(2)(B)(iii); *cf. In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985) (dismissing petitioners' motion for stay because it was not accompanied by a petition to review the underlying order).

The distinction between stays and injunctions is dispositive in other contexts as well. In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), this Court concluded that a district court's order staying a lawsuit in favor of parallel state court litigation was not an "injunction" within the meaning of 28 U.S.C. § 1292(a)(1), and was therefore not subject to an interlocutory appeal. Observing that "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)," 485 U.S. at 279, the Court overruled a line of cases that had construed stays as injunctions, terming the doctrine "sterile and antiquated." *Id.* at 287.

To be sure, the Court in *Gulfstream* was considering a case in which a court was staying its own procedures. But Justices of this Court have recognized the distinction between stays and injunctions even when the stays applied to judgments of other courts. As Circuit Justice Scalia has explained, stays of lower-court mandates "simply suspend [the lower court's] alteration of the status quo," whereas injunctive relief on appeal "grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers); *see also Brown v. Gilmore*, 533 U.S. 1301, 1301-02 (2001) (Rehnquist, C.J., in chambers); *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) ("[A]pplicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress . . . . By seeking an injunction, applicants request that I issue an order *altering* the legal status quo."). Thus it is well-settled that stays are distinct from, and not merely a subspecies of, injunctions. Because a stay is distinct from an injunction, the issue presented here can be resolved based on the text of § 1252(f)(2), with its solitary use of the term "enjoin."

B. The Stay Sought by Petitioner Is Not an Injunction Within the Meaning of § 1252(f)(2).

Nken does not seek an injunction against a party to the litigation (i.e., the Attorney General). Rather,

he seeks to suspend the operation of the BIA's removal order while the Fourth Circuit considers his petition. *See Tesfamichael*, 411 F.3d at 171 (describing the relief sought by aliens in this context as "a stay of their removal order pending review of that order"); *see also Thapa v. Gonzales*, 460 F.3d 323, 329 (2d Cir. 2006) ("[I]n granting a stay . . . . we would be putting a hold on the operation of the order while we reviewed the merits of the underlying petition for review."); *cf. Patel v. Ashcroft*, 378 F.3d 610, 613 (7th Cir. 2004) (Posner, J.) (noting that deportation in violation of a stay was unlawful because "the order of removal was legally infirm" as a result of the stay). Indeed, the jurisdiction of a court of appeals on a petition for review is limited by statute to review of *only* the final order of removal. *See* 8 U.S.C. §§ 1252(a)(1), (a)(5), (b)(9); *see also Obale v. Att'y Gen. of the U.S.*, 453 F.3d 151, 158 & n.6 (3d Cir. 2006).

Because the object of a stay of removal is the final order of removal, it does not fall within the ambit of the term "enjoin" as used in § 1252(f)(2):

> [Petitioner] simply asked us to suspend the operation of her removal order while we considered her petition. If we had agreed to the petitioner's request, a simple stay would have done the job. It would not have been necessary for us to enjoin or restrain the Attorney General of the United States (the named respondent) individually. To turn a stay into an injunction in these circumstances is overkill, and it depreciates the traditional

> force of a simple stay, which assumes automatic respect for our orders without the need for formal restraint or prohibition of individual parties.

Teshome, 545 F.3d at 291 (Michael, J., dissenting from the denial of rehearing en banc).

In reaching a contrary conclusion, the Fourth Circuit relied upon a deceptively simple syllogism. It observed that the stay of the final order of removal prevented the government from deporting the alien, and therefore had the same practical effect as an injunction against removal of the alien. *See Teshome*, 528 F.3d at 333. Accordingly, the Fourth Circuit concluded that the term "enjoin" in § 1252(f)(2) should be construed to also encompass a stay.

The Fourth Circuit's logic does not hold. The mere fact that a stay of a removal order has a practical effect that is similar to that of an injunction against removal does not mean that this Court should interpret the statutory term "enjoin" to mean "stay." *See Hor*, 400 F.3d at 484 ("Certainly there is a functional overlap: a stay, like an injunction, can stop an agency in its tracks, and courts accordingly require the same kind of showing for a stay of an agency's order as for an interlocutory injunction. But the words nonetheless cover different domains." (citation omitted)). *Any* stay of a judgment – whether that judgment is entered by a court or by a quasi-judicial administrative body such as the BIA – will have much the same impact as an injunction against a party enforcing that judgment. Similarly,

any stay of a pending proceeding will have much the same impact as an injunction against a party participating in that proceeding. For instance, the stay in *Gulfstream* would have had the same practical effect as an injunction issued to the litigants barring them from pursuing the action. Yet this Court held that the stay was not an "injunction" within the meaning of 28 U.S.C. § 1291, notwithstanding its similar practical consequences. Moreover, under the Fourth Circuit's logic, even the ultimate relief obtained in a successful petition for review would constitute an "injunction" because the vacatur of a BIA order of removal has the practical effect of preventing the BIA from removing someone.

In sum, the fact that a stay and an injunction have a similar effect on an alien's ability to remain in the country does not remotely compel the conclusion that the two terms are interchangeable.

C. Canons of Statutory Construction Require Respect for Congress's Use of the Terms "Stay" and "Enjoin" to Signify Distinct Legal Concepts.

The Fourth Circuit's position that Congress completely revised the traditional standard for granting a "stay" by limiting the courts' power to "enjoin" removal in § 1252(f) is at odds with Congress's careful and repeated separate uses of the terms "stay" and "enjoin," and with traditional canons of statutory construction. *Cardoza-Fonseca*, 480 U.S. at 432 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (bracket in original; quotation marks omitted)); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each." (quotation marks omitted)).

The Seventh Circuit noted that "Title 8 as a whole refers to 'stay' 14 times (in the current sense as opposed to 'overstay a visa' and the like) . . . ." *Hor*, 400 F.3d at 485; *see* 8 U.S.C. §§ 1160(d), 1186b(d)(2)(C), 1229a(b)(5)(C), 1229a(c)(7)(C)(iv), 1229c(f), 1231(a)(1)(B)(ii), 1231(c)(2), 1231(c)(2)(A), 1231(c)(2)(B), 1231(c)(2)(C) (word used twice), 1252(b)(3)(B) (same); 1255a(e). By contrast, Title 8 uses the words "enjoin" or "injunction" seven times. *See* 8 U.S.C. §§ 1227(a)(2)(E)(ii), 1252(f)(1) (injunction used in title and enjoin used in subsection), 1252(f)(2) (same), 1324a(f)(2) (injunction used in title and subsection). As Judge Easterbrook concluded for the court in *Hor*, "these words are not treated as coterminous in any provision." 400 F.3d at 485; *see, e.g.*, 8 U.S.C. § 1227(a)(2)(E)(ii) (using the term "enjoined" to refer to injunctive relief in the form of a protective order against domestic violence).

When Congress has taken care in a statutory scheme to use separate terms with distinct meanings, courts should respect the distinctions:

> [T]reating a rule addressed to "injunctions" as covering "stays" would impoverish the

> language and make the legislative task more difficult. Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither, in a statute such as the IIRIRA. By contrast, treating a subsection that mentions injunctions but not stays as covering both would force Congress to add provisos each time it sought to regulate one but not the other. Once a legal community develops a stable nomenclature, it is best to apply it mechanically so that no one is taken unawares, and so that drafting can be uncluttered by provisos.

Hor, 400 F.3d at 484; *see also St. Cyr*, 533 U.S. at 312 n.35 ("'[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts . . . the meaning its use will convey to the judicial mind unless otherwise instructed.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).

Judge Easterbrook's concern is particularly apt here because ignoring the distinct meanings of the terms "stay" and "enjoin" could have impact far beyond the confines of immigration law. The terms appear throughout the U.S. Code. *Compare, e.g.*, 2 U.S.C. § 922(a) (discussing expedited review where Members of Congress seek "injunctive relief") *with* 2 U.S.C. § 922(b) (stating that no "stay" of an order entered under subsection (a) shall be issued by a single Justice of the Supreme Court); *see also*, *e.g.*,

12 U.S.C. § 5229(a)(4) (providing that an order granting an "injunction" pursuant to particular sections "shall be automatically stayed" for three days after entry of the order and pending any appeal); 19 U.S.C. § 1516a(g)(4)(H) (prohibiting a single Justice of the Supreme Court from staying an order entered pursuant to subparagraph (A), including an order granting injunctive relief); 7 U.S.C. § 194(h) (providing that a grant of certiorari by the Supreme Court to review an "injunction" entered by a court of appeals to affirm or modify an administrative cease and desist order entered pursuant to section 193 "shall not operate as a stay of the decree of the court of appeals . . . unless so ordered by the Supreme Court"); 18 U.S.C. § 3626(e)(4) (stating that any "order staying, suspending, delaying, or barring" the automatic stay that is otherwise entered when a defendant or intervenor moves to terminate prospective relief ordered in a civil prison conditions case "shall be treated as an order refusing to dissolve or modify an injunction").

The terms likewise appear throughout the Federal Rules. *Compare, e.g.*, Fed. R. App. P. 8(a)(1)(A) (referring to "a stay of the judgment . . . pending appeal"), *and* Fed. R. App. P. 18 (referring to a "stay pending review" of an agency decision), *with* Fed. R. App. P. 8(a)(1)(C) (referring to a court "granting an injunction while an appeal is pending"); *see also* Fed. R. Civ. P. 62(g)(1) ("This rule does not limit the power of the appellate court or one of its judges or justices . . . to stay proceedings – or

suspend, modify, restore, or grant an injunction – while an appeal is pending . . . .").

Thus, this Court should reject the Fourth Circuit's conclusion that Congress used "enjoin" as a shorthand way of referring to both stays and injunctions: "Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting." *AAADC*, 525 U.S. at 482.

II. IIRIRA'S STRUCTURE AND LEGISLATIVE HISTORY CONFIRM THAT § 1252(f)(2) DOES NOT APPLY TO STAY OF REMOVAL ORDERS PENDING APPEAL.

A. The Structure of § 1252 and IIRIRA Confirms That Congress Did Not Intend § 1252(f)(2) to Alter the Traditional Stay Standard.

The Fourth Circuit's conclusion that § 1252(f)(2) should be read in conjunction with § 1252(b)(3)(B) to radically alter the traditional standard for a stay pending judicial review is at odds with the structure of IIRIRA. This Court has repeatedly held that the plain meaning of a statutory provision is clarified by examining its context. *See, e.g.*, *Dada*, 128 S. Ct. at 2317. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation

omitted). The statutory context here forecloses the Fourth Circuit's interpretation of § 1252(f)(2).

First, in § 1252(b)(3)(B), Congress established that stays of removal would be discretionary rather than automatic. Because § 1252(b)(3)(B) deals explicitly with "stays," that section – and not § 1252(f) – "would have been the natural place to locate an amendment to the operative standard governing their issuance" had Congress intended to so provide. *Tesfamichael*, 411 F.3d at 174; *see also Hor*, 400 F.3d at 484 ("It would have been easy to write something like: 'Service of the petition . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court determines that the standards for an injunction under subsection (f)(2) have been satisfied.'"); *Arevalo*, 344 F.3d at 7 n.4, 8; *Mohammed*, 309 F.3d at 99; *Andreiu*, 253 F.3d at 481. Under the Fourth Circuit's approach, by contrast, Congress directly addressed judicial stays in one part of the statute, and then chose to tuck away the pertinent legal standard for such a stay in § 1252(f), a section that does not even include the word "stay." Because Congress clearly knew how to use the term stay, and in fact did so elsewhere in § 1252(b)(3)(B), the Fourth Circuit's approach is, at the very least, "quite strange." *Andreiu*, 253 F.3d at 481.

Second, Congress employed virtually identical language in § 1252(b)(3)(B) that it had used previously to provide for discretionary stays prior to IIRIRA – stays that were adjudicated using the traditional stay standard. Prior to IIRIRA, the filing

of a petition for review automatically stayed a petitioner's deportation pending appellate review except in cases involving the deportation of aliens who had committed aggravated felonies. In that category of exceptional cases, the issuance of a stay upon filing of a petition for review was discretionary: the petition's filing did not effect a stay "unless the court otherwise directs." *See* 8 U.S.C. § 1105a(a)(3) (1995) (repealed). The Courts of Appeals uniformly interpreted that provision to mean that the traditional stay standard governed the issuance of a stay. *See, e.g.*, *Michael*, 48 F.3d at 664; *Ignacio*, 955 F.2d at 299. Congress virtually replicated the language of now-repealed § 1105a(a)(3) in the new § 1252(b)(3)(B). By preserving the language that the Courts of Appeals had construed as calling for the traditional stay test, Congress indicated that courts should evaluate stay applications under IIRIRA's new § 1252(b)(3)(B) as they had previously done under § 1105a(a)(3). *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (noting that the Court must "assume that Congress is aware of existing law when it passes legislation"); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008) (same). And had Congress intended to alter that stay standard, it would have done so in a clearer manner than to reproduce the prior language verbatim and insert a provision into a different section of the statute where the word "stay" does not even appear. *Cf. Tai Mui v. Esperdy*, 371 F.2d 772, 777 (2d Cir. 1966) (Friendly, J.) ("[If] Congress had wanted to go that far, presumably it would have known how to say so.").

Third, the Fourth Circuit's insistence that § 1252(b)(3)(B) and § 1252(f)(2) must be read together in determining the standard for a stay is in tension with the special rules Congress adopted to govern stays in "transitional" cases, i.e., cases already initiated when IIRIRA took effect. Section 309(c)(4)(F) of IIRIRA governs stays in such transitional cases, and it does so using the same language that Congress chose in § 1252(b)(3)(B). *See Arevalo*, 344 F.3d at 8. Because new § 1252(f) has no analog in the rules governing transitional cases, the Courts of Appeals have without exception applied the traditional test to stay motions in transitional cases. *See, e.g.*, *Weng*, 287 F.3d at 1339 n.6; *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999); *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). Yet nothing in the statute or legislative history suggests that Congress intended stay motions to be decided using one test for transitional cases and another for cases arising thereafter. Given that the stay-related language is identical in both the transitional and permanent regimes that Congress established, the most logical inference is that Congress meant for the rules governing stays to be identical – and had no intention that those rules would have any relation to new § 1252(f)(2).

Fourth, far from harmonizing the two provisions, the Fourth Circuit's interpretation of § 1252(f)(2) as setting forth the standard for a stay pending appeal renders the explicit stay provision in § 1252(b)(3)(B) mere surplusage. If § 1252(f)(2) set forth the exclusive standard to govern the grant of stays pending appeal – a standard under which stays are

anything but automatic – there would have been no need for Congress to specify in § 1252(b)(3)(B) that service of a petition for review would not automatically stay removal.

Likewise, interpreting § 1252(f)(2) to apply to stays and other preliminary relief would render critical terms in § 1252(f) surplusage. *See Arevalo*, 344 F.3d at 7; *Mohammed*, 309 F.3d at 98-99; *Andreiu*, 253 F.3d at 480-81. In particular, § 1252(f)(1) limits the jurisdiction of a court to "enjoin or restrain" the operation of IIRIRA, while § 1252(f)(2) limits the jurisdiction of a court to "enjoin" removal. If "enjoin" were construed as a catch-all for injunctions *and* stays, it would leave "restrain" in 1252(f)(1) without meaning. While a construction that would render the word "restrain" superfluous is to be avoided in any event, it is particularly to be avoided here. That is because the Hobbs Act, on which review of the orders at issue here was modeled, *see* 8 U.S.C. § 1252(a)(1), uses the term "restrain" to denote temporary equitable relief, and the term "enjoin" to denote permanent injunctive relief on the merits. *Compare* 28 U.S.C. § 2349(b) (providing that a court of appeals, in reviewing agency orders, may "restrain or suspend" the order pending determination of the petition for review), *with* 28 U.S.C. § 2349(a) (providing that a court of appeals has jurisdiction to make a judgment "enjoining" or "suspending" an agency order upon the filing of a petition for review). As Judge Selya observed, "The most sensible way to give operative effect to both words in this statutory scheme is to treat the word 'enjoin' as referring to permanent

injunctions and the word 'restrain' as referring to temporary injunctive relief (such as a stay)." *Arevalo*, 344 F.3d at 7.

Fifth, it is unnecessary to construe the word "enjoin" in § 1252(f)(2) as applying to stay of removal orders because the provision serves an independent purpose. As Justice Scalia summarized in *AAADC*, § 1252(f) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." 525 U.S. at 481-82. In individual cases, § 1252(f)(2) preserves the ability of courts to grant injunctive relief, but only in the rare instance where it is clear that the petitioner's removal is prohibited as a matter of law. *Hor*, 400 F.3d at 483. Thus "[l]ike the Norris-LaGuardia Act, this enactment curtails resort to a particular remedy – the injunction." *Id.*

The Fourth Circuit and Respondent have suggested that § 1252(f)(2) must be read as applying to stays pending appeal because it would otherwise have no application in any other circumstance. *See Teshome*, 528 F.3d at 334; Resp. Opp. at 18-19. The argument appears to be that the "zipper clause" in 8 U.S.C. § 1252(b)(9), *see AAADC*, 525 U.S. at 483, means that "the *only* way to obtain '[j]udicial review of . . . questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States' is by way of a petition for judicial review of a final order of removal." Resp. Opp. at 18-19 (quoting § 1252(b)(9); bracket in original). Respondent thereby concludes that the

question of whether to issue an injunction (as opposed to a stay) would not arise because no court would have jurisdiction in a case seeking such a remedy. *Id.*

But this Court's decisions in *AADC* and *St. Cyr* underscore why Congress might have felt the need for such a provision for those cases – however exceptional – where neither § 1252(b)(9) nor § 1252(g) would apply to preclude judicial review outside the context of the underlying removal order itself. *See Hor*, 400 F.3d at 483 ("This makes a good deal of sense as long as removal orders may be reviewed in other ways.").

Moreover, accepting this argument would require this Court to conclude that Congress used the word "enjoin" in § 1252(f)(2) not only to include stays, but to be coterminous with the word "stay." That is, if there was no possible application of § 1252(f)(2) other than to a stay pending appeal, then Congress intended "enjoin" in § 1252(f)(2) to mean "stay" and *only* "stay." This interpretation runs contrary to every other definition and use of the term "enjoin" and to the canon of construction that different words in a statute convey different meanings. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006); *Barnhart*, 534 U.S. at 454.

Petitioner's interpretation of the statute therefore ascribes the proper meaning to § 1252(f)(2) that Congress intended, and is the only interpretation consistent with the statute's plain text and purpose, and with the overall structure of IIRIRA.

B. Legislative History Confirms That Congress Did Not Intend § 1252(f)(2) to Set Forth the Standard for Stays.

Nothing in IIRIRA's copious legislative history indicates that Congress intended to alter the traditional standard for stays. *See Andreiu*, 253 F.3d at 481 n.1 (en banc). That omission itself is telling. *See St. Cyr*, 533 U.S. at 320 n.44 ("'In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.'" (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting))).

Subsequent congressional actions confirm what should be inferred from prior legislative history – that Congress intended that courts continue after IIRIRA to apply the traditional discretionary stay standard. Since IIRIRA, Congress has twice rejected amendments that would have modified § 1252(f)(2) to provide that stay motions should be decided under the restrictive standard set forth therein. In considering both the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, and the Comprehensive Immigration Reform Act of 2006 ("CIR"), S. 2611, 109th Cong. (2006) (enacted), Congress rejected amendments that would have modified the extant stay provision in § 1252, i.e., subsection (b)(3)(B), to provide that the standard for stays is governed by the standard for injunctions set forth in § 1252(f)(2). *Compare* REAL ID Act of 2005, H.R. 418, 109th

Cong. § 105(a)(2)(A) (2005) (including, in the version engrossed as passed by the House of Representatives, the proviso "pursuant to subsection (f)" after "unless"), *with* REAL ID Act of 2005, Pub. L. 109-13, § 106 (2005) (omitting such language in the final version); *see also* S. Amdt. 4083, 109th Cong., 2d Sess. (Feingold/Brownback Amendment to the Comprehensive Immigration Reform Act of 2006) (successfully striking provision that would have applied subsection (f) to stays of removal in subsection (b)(3)(B)). These bills were both proposed and rejected *after* multiple courts had held that § 1252(f)(2) was inapplicable to stays.

Had Congress intended to modify the traditional standard for stays of removal pending appeal, it would not have twice rejected amendments that would have achieved that result. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (subsequent action by Congress in declining to adopt new language is "entitled to significant weight" in statutory construction).

III. THE FOURTH CIRCUIT'S CONSTRUCTION OF THE STATUTE WOULD LEAD TO RESULTS THAT ARE AT BEST PECULIAR AND ARBITRARY AND AT WORST ABSURD.

In addition to the myriad textual and structural deficiencies identified above, the Fourth Circuit's construction must be rejected because its reading of § 1252(f)(2) would generate "serious practical problems." *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003); *United States*

v. Wilson, 503 U.S. 329, 334 (1992) (arbitrary results are "not to be presumed lightly").

First, applying § 1252(f)(2) to stays of removal orders pending appeal would in many instances require courts to apply a more stringent standard to provide temporary relief pending appeal than the longer-lasting and more intrusive relief associated with vacating a final order of removal. *Arevalo*, 344 F.3d at 8; *Tesfamichael*, 411 F.3d at 175; *Andreiu*, 253 F.3d at 477. For example, the Courts of Appeals review de novo the BIA's legal determinations – both pure questions of law and applications of law to fact. *See Rranci v. Att'y Gen. of the U.S.*, 540 F.3d 165, 171 (3d Cir. 2008); *Andreiu*, 253 F.3d at 477. In cases raising legal questions, the court would have to answer those questions "by clear and convincing evidence" based only on a stay motion and solely for the purpose of placing the removal order on temporary hold. *Tesfamichael*, 411 F.3d at 175. Where the question raised is one of first impression, applying § 1252(f)(2) would foreclose a stay completely if the answer is not "clear and convincing" at the stay stage. *See Weng*, 287 F.3d at 1340; *Andreiu*, 253 F.3d at 482. In those rare cases where a stay was granted, applying the § 1252(f)(2) standard to stay motions would render a merits hearing superfluous because the stay decision would "essentially duplicate the decision on the merits." *Id.* Application of the § 1252(f)(2) standard to stays thus "creates a severe anomaly." *Arevalo*, 344 F.3d at 8. This "Kafkaesque design" is at the very least "counterintuitive" and "peculiar." *Id.*

More importantly, however, where a stay was denied under § 1252(f)(2) but the petitioner had both a high likelihood of success on the merits and faced certain or near-certain irreparable harm if removed, application of the § 1252(f)(2) standard would be absurd. *See id.* Application of this standard to stay motions would severely restrict the equitable authority of the courts (including this Court) to stay potentially – and even likely – erroneous orders of removal. Judge Easterbrook has suggested that "removal is 'prohibited by law' only when the person is a citizen of the United States or holds a visa of unquestioned validity," *Hor*, 400 F.3d at 483, or is "[a] diplomat, or an alien who prevailed before the Board but was threatened by a rogue subordinate who refused to acknowledge the Board's authority," *id.* The "clear and convincing evidence" standard thus "would effectively require the automatic deportation of large numbers of people with meritorious claims," *Andreiu*, 253 F.3d at 482, and with severe consequences – including loss of fundamental liberties and even lives. *See Lanza v. Ashcroft*, 389 F.3d 917, 927-28 (9th Cir. 2004); *Jordan v. De George*, 341 U.S. 223, 231 (1951). And while these petitioners technically are entitled to return should they prevail on the merits of their petitions for review, "[t]he ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim." *Hor*, 400 F.3d at 485. Yet under the Fourth Circuit's reading of § 1252(f)(2), there is no mechanism to prevent that result. The notion that Congress intended to send away petitioners with a high

likelihood of success on the merits and a high or even certain risk of irreparable harm based on their failure to meet a much higher standard than that required for relief on the merits – and before they have ever had an opportunity to brief their cases in full – is absurd.

Nor should there be any doubt that a great many petitioners who have been ordered removed will ultimately succeed on the merits of their petitions for review. As Judge Posner has observed, "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005); *id.* at 829 (noting that panels of the Seventh Circuit reversed the BIA "in a staggering 40 percent" of petitions resolved on the merits and that "[o]ur criticisms of the Board and of the immigration judges have frequently been severe"). Numerous other judges have expressed similar chagrin and dismay at the frequency of arbitrary and capricious review in the immigration courts. *See, e.g.*, *Zuh v. Mukasey*, 547 F.3d 504, 513-15 (4th Cir. 2008) (noting "increasingly strident . . . criticisms of the immigration review process" and "add[ing] to this rising tide of criticism"); *N'Diom v. Gonzales*, 442 F.3d 494, 500-01 (6th Cir. 2006) (Martin, J., concurring) (describing "the significantly increasing rate at which adjudication lacking in reason, logic, and effort from . . . immigration courts is reaching the federal circuits"); *see also* U.S. Gov. Accountability Office, GAO-08-940, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* 7-9

(2008); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 Geo. Immigr. L.J. 1, 11-36 (2006); ABA Commission on Immigration Policy, Practice & Pro Bono, *Dorsey & Whitney Study of Board of Immigration Appeals: Procedural Reforms to Improve Case Management* 40-47 (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

In short, application of § 1252(f)(2)'s "exacting standard" could "impede access to the courts in meritorious cases," causing substantial harm to petitioners and calling into question "the legitimacy and public acceptance" of the statutory regime. *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers). The consequences of doing so are particularly egregious "in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped." *Id.* Nothing in the plain text or legislative history of IIRIRA suggests that this was Congress's intent.

Finally, because the Fourth Circuit's interpretation of § 1252(f)(2) is not limited to asylum claims, it would apply to a host of other claims, including, in particular, to a claim that removal is unlawful because the petitioner is a U.S. citizen. The Fourth Circuit's reading would frustrate the statutory scheme Congress put in place in IIRIRA for assessing claims of U.S. citizenship.

Under § 1252(b)(5), if a petitioner claims to be a U.S. citizen and there exists a genuine issue of material fact about his nationality (and thus some likelihood of success), the court of appeals must transfer the proceeding to the district court for a hearing on the claim pursuant to 28 U.S.C. § 2201. Such a hearing is, in fact, constitutionally compelled. *See Agosto v. INS*, 436 U.S. 748, 753 (1978); *accord Ng Fung Ho v. White*, 259 U.S. 276 (1922). The burden of proof at such a hearing would not be clear and convincing evidence, but rather a mere preponderance of the evidence. *See Leal Santos v. Mukasey*, 516 F.3d 1, 4 (1st Cir.), *cert. denied*, 129 S. Ct. 73 (2008); *Patel v. Rice*, 403 F. Supp. 2d 560, 561 (N.D. Tex. 2005), *aff'd*, 224 F. App'x 414 (5th Cir. 2007) (unpublished table decision), *cert. denied*, 128 S. Ct. 1217 (2008).

Under the Fourth Circuit's reading of § 1252(f)(2), however, that citizen could be removed prior to his citizenship hearing if he could not meet the clear and convincing evidence burden at the stay stage – notwithstanding his likelihood of success and the obvious equities counseling against deportation of a likely U.S. citizen with an appeal pending. Although in theory the hearing could proceed without the presence of the citizen, doing so would raise serious due process concerns. *See Agosto*, 436 U.S. at 756-57. And in any event, the purported citizen's presence and testimony at the hearing would be critical to assess credibility, introduce evidence, and ensure that U.S. citizens are not erroneously deported. *See id.* at 757 ("[I]t is only when the witnesses are present and subject to cross-

examination that their credibility and the weight to be given their testimony can be appraised." (quotation marks omitted)). Congress could not have intended that § 1252(f)(2) would permit removal of a purported U.S. citizen before his congressionally-mandated district court hearing.

Given these consequences and the absence of any clear indication to the contrary, this Court should not interpret the word "enjoin" to displace the traditional stay standard and restrict the stay power that has always been employed by federal courts – including this Court – in the administration of justice.

CONCLUSION

The Court should maintain the stay that it ordered on November 25, 2008, or in the alternative, should vacate the Fourth Circuit's order denying Nken's motion to stay his final order of removal and remand for reconsideration of his motion under the proper, traditional standard for stays.

Respectfully submitted,

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Appendix

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than

the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based

solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such

title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending

the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless

manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by

reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from

detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the

[1] See References in Text note under this section.

name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or

written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.